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No. 81-147

In the

Supreme Court of the United States

In Re ANABEL J. McCUTCHEON,

Petitioner,

vs.

THE BOARD OF EDUCATION, CITY OF CHICAGO, MRS. CAREY B. PRESTON, MICHAEL J. MURRAY, EARL B. HOFFENBERG, JOSEPH P. HANNON, WILLIAM ROHAN, GERARD J. HEING, MARIO GAROFALO,

Respondents.

Appeal from the United States Court of Appeals for the Seventh Circuit.

Docket No. 79-2568

RESPONSE TO PETITION FOR AN EXTRAORDINARY WRIT OR IN THE ALTERNATE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

The petitioner's "Statement of the Facts", at pp. 5-7 of her brief, represents random references to the trial docket, appended with irrational "editorial comment", and further embellished by assignments of imagined plots among the court clerks, judges and defense attorneys.

For an accurate statement of the case, defendants-respondents refer this Court to the statement contained in the opinion of the Seventh Circuit Court of Appeals which is reproduced in plaintiff-petitioner's brief (appendix, pp. 14a-16a).

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

It is our understanding that the Supreme Court grants certiorari as a matter of grace, to consider important matters of law and equity, under the listed reasons contained in Supreme Court Rule 19; not merely to referee the dog fight between petitioner and the respondents and their attorneys.

At page i, petitioner McCutcheon states three Questions Presented for Review. However, her Reasons for Granting the Petition, at pp. 10-13 address only her alternative prayer for Mandamus, Prohibition and "Writ[s] Extraordinaire."

The first question for review is:

> I. Whether a March 26, 1981 irrelevant decision of the Illinois (State) Appellate Court on Appeal to the Illinois Supreme Court has been prejudicially substituted by the (Federal) Seventh Circuit Court of Appeals for the Judgment Order, 78-3899 and 16 trial court transcripts (Nov. 1, 1978-Nov. 30, 1979) records detrimental to Defendants made in the United States District Court of Judge Leighton.

Here, Ms. McCutcheon apparently refers to the submission to the Seventh Circuit of the opinion of the Illinois Appellate Court in *McCutcheon* v. *Board of Education,* ..... Ill. app. 3d ....., 419 N.E.2d 451, which decision affirmed the state trial court's finding that McCutcheon received due process and a fair hearing within the requirements of both Illinois law and the constitution of the United States.

Counsel for defendants-appellees presented this opinion as a citation of additional authority under local Circuit Rule 11. The decision of the state court of review is highly relevant to the pending appeal; however, the Seventh Circuit reached its decision without the necessity of considering it. Certainly, the court did not "substitute" for any other part of the record before it.

This claim of error is a product of Ms. McCutcheon's vivid imagination.

The second question for review is:

> II. Whether the Seventh Circuit Court of Appeals, after three years' receipt of "ex parte" communications from defendants, denied non-attorney due process and equal representation by summarily denying her the public record, a public jury trial, a Change of Venue, Disqualification of Judges Bauer, Cummings, and by rendering an "Unpublished Order Per Curiam" via mail.

Ms. McCutcheon seems fascinated with the theory that she loses her many lawsuits because defense counsel engage in "*ex parte*" communications with the judges who are to decide her cases. Obviously, she loses her lawsuits because they are meritless. It should be even more obvious that appellees' counsel could hardly communicate matters concerning Ms. McCutcheon's claims to a panel of appellate judges whose identity was unknown to all of the parties until the release of the order deciding the appeal.

With regard to the other points under the second question presented under this for review petitioner, respondents state as follows:

Denial of public record. We are unable to discern what it is that Ms. McCutcheon claims was denied to her.

Presumably, she would maintain a file containing pleadings, legal memoranda, orders, etc., as defense counsel have done. If so, such file would be a duplicate of the court record. If she has failed to maintain such a file, which is doubtful, the carelessness must fall upon her and not the defendants. This charge does not bear upon the substantive claim presented by McCutcheon. In any event, this is a dispute between McCutcheon and the offices of the clerks of the courts, and she advises (Petitioner's Brief, par. 8, page 7) that she has brought suit against them for that reason.

Public jury trial. The record does not indicate that McCutcheon ever asked for a jury, either public or private. In any event, the claim is moot since the district court dismissed the action for failure to state a claim for federal relief, F.R.C.P. 12.

Change of Venue, Disqualification of Judges Bauer, Cummings. Petitioner presents no argument on this point, but apparently she is referring to her motion of May 11, 1981, entitled:

> PETITION FOR A CHANGE OF VENUE TO SPRINGFIELD, ILLINOIS OR IN THE ALTERNATIVE A MOTION TO DISQUALIFY JUDGE WALTER CUMMINGS AND OTHERS ACTING IN CONJUNCTION WITH HIM ON THE GROUNDS OF PREJUDICE.

This motion, which was denied in the court's final order, is printed at Appendix pp. 8-12a of petitioner's brief. This document is a rambling, confusing, incoherent and beligerent attack upon attorneys, judges, court clerks, defendants, and various relatives of some of them. It is apparent that McCutcheon derives personal pleasure from these attacks, rendered as they are under courtroom

privilege. Nowhere does she state any legal grounds for the recusal of the judges of the Seventh Circuit who found against her on her claim.

Neither Judge Walter Cummings nor Judge William Bauer were members of the panel which ultimately decided McCutcheon's appeal.

Rendering an "Unpublished Order Per Curiam" via mail. It is not possible to discern a denial of due process and equal protection upon the claim that the court used the United States mail service to deliver its opinion to the parties.

The third question for review is:

> III. Whether the Chicago Appellate Courts failed to recognize that the Statute for "Removal of Cause-Notice and Hearing-Suspension" (Ill. Rev. Stat., 1975: #34-85) relied upon by the Defendants is discriminatory and unconstitutional for the reason that it permits the same (lay) persons (Chicago Board of Education-District of over 500,000 inhabitants) to bring charges and then sit in judgment on those charges, without an independent hearing officer required of other Illinois School Districts in the dismissal of Tenured Personnel.

For the first time, petitioner now asserts in this petition for a writ, the unconstitutionality of the state statute. This claim has not been heretofore offered nor preserved for review. To the extent that this matter was collaterally addressed by the plaintiff to the Seventh Circuit, it held (petitioner's brief, Appendix, p. 17a):

> Liberally construing the facts of McCutcheon's complaint and accepting them as true, as we must in reviewing a dismissal of a complaint on the pleadings, it is apparent that she has not offered facts which if proven would establish a violation of her constitu-

tional rights. The complaint is a rambling and confusing document consisting mainly of a long diatribe against those whom McCutcheon believes were in some way responsible for her dismissal.

Petitioner's brief is, in the same manner, a rambling and confusing document consisting in the main of diatribes against defendants, defense attorneys, judges and court clerks. Her complaint failed to allege facts to support claims of unconstitutionality, and her brief fails to assert facts or valid legal arguments of any error below which would raise an important constitutional question for review in this Court.

REASONS FOR DENYING PETITIONS FOR OTHER WRITS

At pp. 10-13 of her brief, McCutcheon prays for writs of mandamus, prohibition and other writs.

These writs are not substitutes for the review of the decisions of the lesser courts. As stated by the Ninth Circuit in an early case, *Barnes* v. *Lyons,* 187 F. 881, 884 (1911):

> [M]andamus will lie when the court has exceeded its jurisdiction . . . [but] the manner in which jurisdiction is exercised—that is to say, the method of practice by which the court's discretion or judicial function is invoked—is not jurisdictional.

At pages 883-884, the court also observed:

> While it may be that mandamus to an inferior court of the United States is in the nature of appellate jurisdiction (Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92), yet it is never employed to revise or annul the decision of an inferior court where such decision proceeds from a judicial act and is within the scope of its jurisdiction and discretion. An inferior court "cannot be reviewed and reversed in this form of proceeding, however erroneous it may be or supposed to be." Ex parte Secombe, 19 How. 9, 15 L. Ed. 565. In such a proceeding, "the court," says Chief Justice Marshall in Ex parte Burr, 9 Wheat. 529, 530, 6 L. Ed. 152, "is not inclined to interpose unless it were in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper." In Ex parte Bradley, 7 Wall. 364, 377, 19 L. Ed. 214, the court says:
>
> "For we agree that this writ does not lie to control the judicial discretion of the judge or court; and

> hence, where the act complained of rested in the exercise of this discretion, the remedy fails."

In a similar vein, the Eighth Circuit stated, in *Kay Ferer, Inc.* v. *Hulen,* 160 F. 2d 146, 148 (1947):

> [Mandamus] is not a substitute for an appeal or writ of error and it will not lie as a rule where there is a remedy by appeal or writ of error or by certiorari, ...

Cited as authority for this holding is *Federal S. and L. Ins. Corp.* v. *Reeves,* 148 F. 2d 731 (8th cir., 1945); at p. 732, that court held:

> It is elementary that mandamus can not be used to control the lawful discretion of a trial court (Frankel v. Woodrough, 8 Cir., 7 F. 2d 796, 797; Los Angeles Brush Mfg. Corporation v. James, 272 U.S. 701, 705, 47 S. Ct. 286, 71 L. Ed. 481); nor to compel a trial court to reverse a decision which it has rendered on a question within its jurisdiction (Hosey v. Kennamer, 8 Cir., 21 F. 2d 64). Mandamus is not granted as of right, but its issue is a matter of sound judicial discretion. The writ may not be employed as a substitute for appeal. It is properly denied where the remedy by appeal is available, as it is here, in the event of a final judgment against the petitioner in the District Court. Brictson Mfg. Co. v. Munger, 8 Cir., 20 F. 2d 793, 794; Fred Benioff Co. v. McCulloch, 9 Cir., 133 F. 2d 900; Roche v. Evaporated Milk Association, 319 U.S. 21, 28-31, 63 S. Ct. 938, 941, 87 L. Ed. 1185. As said in the opinion in the Roche case, the traditional use of the writ of mandamus "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

While these courts address mandamus only, it is readily accepted that the same understandings apply to Prohibition.

Petitioner asks Mandamus to require the Seventh Circuit to "enter 16 trial transcripts". This is nonsense! It is appellant's responsibility to provide the court with transcripts, and a Circuit Court of Appeals merely receives them, it does not "enter" the transcripts of the District Court. And, in any event, the transcripts came from the official court reporter.

Next, McCutcheon asks this Court to prohibit the entry of the "Unpublished Order Per Curiam" (Appendix, p. 13a-26a). Perhaps McCutcheon is distressed that the appellate review found her action frivolous and meritless—but the order of the court did not make it so, McCutcheon did it on her own. In any event, the issuance of the order of which she complains is within the fundamental jurisdiction of the court. Without such an order, or an opinion, she would have nothing to offer to this Court for review.

The Petition for Writ of Prohibition directed against the entry of costs to the prevailing party is merely an attempt to ask this Court to review and reverse the award, already entered by the Seventh Circuit.

The stated reason, that attorneys are without statutory authority to represent the defendants, is false and known to be false by McCutcheon.[1] The Seventh Circuit did address this issue, contrary to McCutcheon's assertions.

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[1] This fixation resulted in McCutcheon instituting a separate action on this issue, against the Board of Education, the defense attorneys and others. Upon motion for summary judgment, the Honorable Marvin Aspen held for all defendants. This decision came prior to the submission to this court of petitioner's present brief. McCutcheon v. Board of Education, et al., case no. 81 C 98, U.S.D.C. N.D. Ill. (unpublished). McCutcheon did not affect a timely appeal from this order.

At appendix, p. 26a, the Court, in ruling on McCutcheon's lesser issues on appeal, stated:

> 9. The Defendant (sic) Attorneys have no statutory authority to represent (the defendants) . . .
> This attack on the propriety of the retention of defense counsel does not bear on upon McCutcheon's present claim.

McCutcheon also asks for a "Writ Extraordinaire" for each of four "extraordinary circumstances" which she sets forth at pp. 11-12 of her petition. These are really questions for which McCutcheon seeks review. Most of the assertions do not bear on McCutcheon's action; and, in the main, the facts asserted are either false or deliberate misrepresentations. (For example, attorneys Heineke and Brown were never Corporation Counsels for the City of Chicago; neither they, nor any other defense attorney engaged in "ex parte" communications concerning this case with any judge of the Seventh Circuit. Defendants are unable to discern what Judge Cummings did that so displeased McCutcheon and caused her to mount the spurious attack against his wife.) All grounds lack merit.

ADDITIONAL REASONS FOR DENYING PETITIONS FOR WRITS

As reported in the Seventh Circuit's statement of facts (petition, Appendix, p. 15a), McCutcheon was notified on September 7, 1976 of her suspension pending a hearing on charges for dismissal. Since that time, she has conducted a legal vendetta against her former employers, its personnel and privies, and the attorneys who defended them. To date, and including the present action, she has filed approximately 15 lawsuits in state or federal court; McCutcheon regularly appeals and petitions for certiorari from adverse decisions. Her purpose seems to be the use of the courts as a forum to attack the persons who displease her. The typical complaint attacks the integrity of the defendants. As the case proceeds, she then moves against the defense attorneys. Finally, she insults the judges who have ruled against her, and accuses court clerks of altering official records.

CONCLUSION

For the reasons stated, defendants-respondents respectfully pray that this Court deny the plaintiff-petitioner's writ[s].

Respectfully submitted,

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